(15) (16)

Nos. 96-552 and 96-553

In the Supreme Court of the United States

OCTOBER TERM, 1996

RACHEL AGOSTINI, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

CHANCELLOR OF THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ET AL., PETITIONERS

v.

BETTY-LOUISE FELTON, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECRETARY OF EDUCATION

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QUESTIONS PRESENTED

1. Whether the Court should overrule its decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

2. Whether Rule 60(b) of the Federal Rules of Civil Procedure is a proper vehicle for obtaining the relief petitioners seek.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 11a-13a)[1] and the district court (Pet. App. 1a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1996. The petitions for a writ of certiorari were filed on October 7, 1996, and were granted on January

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 96-552.

17, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

1. The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion."

2. Federal Rule of Civil Procedure 60(b) provides, in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT

1. This case involves a federally funded program to provide remedial instruction and support services to needy elementary and secondary school students. See 20 U.S.C. 6301 *et seq*. To qualify for assistance under the "Title I" program,[2] a student must reside within the attendance

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[2] The program at issue was originally known as "Title I," because it was first enacted as Title I of the Elementary and Secondary Education Act of 1965. In 1981, Congress enacted Chapter 1 of the Education Consolidation and Improvement Act, Pub. L. No. 97-35, Tit. V, Subtit. D, 95 Stat. 357, 464, as a continuation of Title I, and the program became known as "Chapter 1." See *Aguilar* v. *Felton*, 473 U.S. 402, 404 n.1 (1985) (discussing the program's earlier history). In 1988, Congress enacted a new version of the program in the Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. No. 100-297, §§ 1003(a), 6303(a), 102 Stat. 431. Effective July 1, 1995, the Chapter 1 program again became known as "Title I," pursuant to the Improving America's Schools Act

boundaries of a public school located in a low-income area, and must be failing, or at risk of failing, the State's student performance standards. 20 U.S.C. 6313, 6315(b). Title I funds may be used only to supplement, and not to supplant, the students' regular classroom instruction. 20 U.S.C. 6322(b); 34 C.F.R. 200.12(a).

Local educational agencies (LEAs) that receive federal Title I funds must provide Title I services "equitabl[y]" to students in secular and religious private schools as well as public school students. See 20 U.S.C. 6321(a) and (d); 34 C.F.R. 200.10-200.11.[3] Expenditures for services to private school children must be equal to the proportion of funds allocated to participating public school attendance areas for low-income children attending private schools. 20 U.S.C. 6321(a)(4), 6313(c). When used for students in private schools, Title I funds may be used only to meet the needs of the students, and not the "needs of the private school" itself. 34 C.F.R. 200.12(b).[4]

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of 1994, Pub. L. No. 103-382, § 101, 108 Stat. 3519. The most recent legislation made substantive changes in the program, but none of those changes materially affects the issues in this case.

[3] If state or local law prohibits the LEA from providing "equitable" services to students in private schools, then the Secretary of Education shall arrange for the direct provision of services to such students. 20 U.S.C. 6321(d).

[4] Title I states that federal funds may be used for schoolwide improvements when "the school serves an eligible school attendance area in which not less than 50 percent of the children are from low-income families" or "not less than 50 percent of the children enrolled in the school are from such families." 20 U.S.C. 6314(a)(1)(B). The Department of Education has interpreted that provision to apply only to public schools; the Department's current regulations and policy guidance make clear that no religious school may participate in the schoolwide improvement provisions of the current law. See 34 C.F.R. 200.12(b) ("An LEA shall use funds under this subpart to meet the special educational needs of participating private school children, but

All Title I services provided to children in private schools must be "secular, neutral, and nonideological." 20 U.S.C. 6321(a)(2). Further, Title I services for private school children may be provided only through public employees, or through other persons independent of the private school and of any religious organization in the provision of those services. 20 U.S.C. 6321(c)(2). Funds for services to private school children must remain under the control of a public agency, and no funds may be provided to any private school. 20 U.S.C. 6321(c)(1). Private school officials are consulted in the design and development of Title I services for private school children, 20 U.S.C. 6321(b), but public school officials "make the

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not for * * * [t]he needs of the private school * * * or * * * [t]he general needs of children in the private school."); see also U.S. Department of Education, Office of Elementary and Secondary Education Compensatory Education Programs, Tit. I, Pt. A Policy Guidance, "Improving Basic Programs Operated By Local Educational Agencies" (Apr. 1996), Providing Services to Eligible Private School Children, at 13 (Policy Guidance) ("Because private schools are not eligible for Title I services [only their eligible children are], schoolwide programs may not be operated in private schools.") (App., *infra*, 1a-2a). A similar provision permitting federal funds to be used for schoolwide improvements was added to the statute in 1978. See Education Amendments of 1978, Pub. L. No. 95-561, § 133, 92 Stat. 2176; see also Education Consolidation and Improvement Act of 1981, Amendment, Pub. L. No. 98-211, § 3, 97 Stat. 1414 (1983). The Department of Education informs us that it never permitted religious schools to take advantage of the schoolwide improvement provisions of the old law.

We have lodged with the Clerk and served on the parties a copy of the Department of Education's current policy guidance on programs under Title I, Part A of the Elementary and Secondary Education Act, as amended. We have also lodged and served copies of the 1993 Department of Education assessment of Title I services delivered to nonpublic school students and the 1989 General Accounting Office study of the costs of compliance with *Aguilar*, discussed at pp. 37-39, *infra*.

final decisions with respect to the services to be provided to eligible private school children," 34 C.F.R. 200.11(b)(3).

2. In 1978, respondents[5] brought this action to challenge, as violative of the Establishment Clause of the First Amendment, the use of Title I funds to pay the salaries of public school teachers to provide secular remedial instruction to religious school students in their own schools. This Court held that such use of Title I assistance did violate the Establishment Clause, because of the risk of entanglement between government and religious authorities. *Aguilar* v. *Felton*, 473 U.S. 402 (1985).

The Court noted that "[t]he professionals involved in the program are directed to avoid involvement with religious activities * * * and to bar religious materials in their classrooms," and that "the administrators of the parochial schools are required to clear the classrooms used by the public school personnel of all religious symbols." 473 U.S. at 407. The Court held, nonetheless, that the public school system's supervisory efforts necessary to ensure that the instruction retained a purely secular content "inevitably results in the excessive entanglement of church and state." *Id.* at 409. The Court concluded that "[a]gents of the city must visit and inspect the religious school regularly, alert for the subtle or overt presence of religious matter in Title I classes," and "the religious school must obey these same agents when they make determinations as to what is and what is not a 'religious symbol' and thus off limits in a Title I classroom." *Id.* at 413.

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[5] The Secretary of Education is also a respondent in this case under this Court's Rule 12.6, but he supports the position of the petitioners. Therefore, our references herein to "respondents" are to the private respondents.

On remand from this Court, the district court entered an injunction prohibiting the Secretary of Education and the Chancellor of the Board of Education of the City of New York from using Title I funds for instructional and counseling services inside religious schools. Pet. App. 14a-16a. It is that injunction from which petitioners sought relief under Rule 60(b) of the Federal Rules of Civil Procedure.

3. After this Court's decision in *Aguilar*, local school districts adjusted their practices to continue providing Title I services to private religious school students, albeit in settings other than inside religious schools. School districts have provided Title I services to religious school students in public school classrooms, at leased sites, through computer-assisted instruction, and in mobile units parked near or on religious school property. The Secretary of Education has required that school districts pay for the administrative costs of such alternative delivery systems from their Title I funds before using any such funds for core instructional and counseling services. See 34 C.F.R. 200.27(c).[6]

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[6] Both the alternative delivery methods and the Secretary's requirement that costs for compliance with the Court's decision in *Aguilar* be paid for "off the top" of Title I funds have been upheld against several statutory and constitutional challenges. See *Pulido* v. *Cavazos*, 934 F.2d 912 (8th Cir. 1991); *Barnes* v. *Cavazos*, 966 F.2d 1056 (6th Cir. 1992); *Board of Educ. of Chicago* v. *Alexander*, 983 F.2d 745 (7th Cir. 1992); *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449 (9th Cir. 1995). Many of the same practices upheld in the foregoing cases now exist in New York City, see 96-553 Pet. App. A43-A70, ¶¶ 24-77, and were upheld against constitutional challenge in *Committee for Public Education and Religious Liberty* v. *Secretary, United States Department of Education*, 942 F. Supp. 842 (E.D.N.Y. 1996). Unrelated challenges to the City's provision of other forms of educational aid to private school children are still pending in the district court in that case.

The economic costs of delivering Title I services to students enrolled in religious schools at sites other than the religious schools themselves are considerable. The Secretary of Education has expressed concern that school districts "have expended hundreds of millions of dollars on non-instructional costs in order to comply with [the Court's decision in *Aguilar*]," Pet. App. 18a, and that New York City was required in one fiscal year alone to spend $6 million on compliance that could otherwise have been used for the core instructional and counseling purposes of Title I, *ibid.* The Secretary has also noted that, although Title I services have been provided to religious school students, since *Aguilar*, through "computer-assisted instruction in private schools and, in appropriate circumstances, parking mobile vans on or near private school property," *id.* at 18a-19a, there has been criticism that "even the alternative arrangements that have developed as a result of [*Aguilar*] are not the most educationally effective methods for providing Title I services," *id.* at 19a. The Secretary of Education therefore supported efforts to have the *Aguilar* decision reconsidered. *Ibid.*

4. In October and December 1995, petitioners filed motions under Federal Rule of Civil Procedure 60(b) for relief from the injunction entered by the district court on remand from this Court. The district court denied the motions. Pet. App. 1a-10a.

The district court first ruled that a Rule 60(b) motion was a proper mechanism for petitioners to present their request for relief from the September 1985 injunction. Pet. App. 7a-10a. The court acknowledged that "Rule 60(b) may not be used as a substitute for appeal," but it found it "plain" that, in this case, a Rule 60(b) motion "does not offend that rule." *Id.* at 7a. After discussing the separate views of several Justices of this Court about *Aguilar* expressed in *Board of Education of Kiryas Joel Village*

School District v. *Grumet*, 512 U.S. 687 (1994), the district court observed that "it is at least unusual, if not extraordinary, that the losing parties to a Supreme Court case can point to such promising indicia that they would win the case now." Pet. App. 7a-8a. In such extraordinary circumstances, the district court concluded, allowing petitioners "to resuscitate pursuant to Rule 60(b) the issue they lost in 1985 strikes the proper balance between the conflicting principles that litigation should have finality and that justice should be done." *Id.* at 8a.

Addressing the "law of the case" doctrine, the district court noted that courts may depart from that rule for a "compelling reason" such as an "intervening change of law." Pet. App. 8a. The court thus accepted that, if petitioners were able to show "a sea change in the law" since this Court's decision in *Aguilar*, the law of the case doctrine would not preclude relief under Rule 60(b). *Ibid.* The court found further that the motion was not untimely, and that respondents would not suffer any cognizable prejudice as a result of any delay in bringing the Rule 60(b) motion. *Id.* at 8a-9a. And the court expressly found that a motion for relief from the injunction was "far preferable" to requiring the school district to challenge the judgment by placing itself in contempt by disobeying the injunction. *Id.* at 9a.

Ultimately, however, the court declined to afford petitioners relief from the judgment. The court observed that "[t]here may be good reason to conclude that *Aguilar*'s demise is imminent, but it has not yet occurred." Pet. App. 10a. The court also found it doubtful that it could properly anticipate any such decision by this Court to reverse its own decision in this case. *Ibid.* The district court suggested, however, that "there could scarcely be a more appropriate vehicle for that review than the same case, in which, eleven years later, the same school board is

struggling with the consequences of the Supreme Court's decision." *Ibid.*

The court of appeals affirmed, in a summary order, "substantially for the reasons" stated in the district court's decision. Pet. App. 13a.

INTRODUCTION AND SUMMARY OF ARGUMENT

The federally funded Title I education program is at the heart of the Nation's commitment to equal educational opportunity. That program establishes a federal-state partnership to lift the educational attainment of children in low-income areas who are failing, or at risk of failing, a State's student performance standards, by giving those students supplementary educational services. Congress required local educational agencies (LEAs) that receive Title I funds to offer Title I services "equitably" to students in both public and nonpublic schools. The judgment of most school administrators, as well as the Secretary of Education, is that the most educationally sound and cost-efficient method of delivering such services to religious school students (as with public school students) is to do so in their own schools.

That sensible and effective method of delivering Title I services to students in religious schools, however, has been foreclosed since this Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985). Even though Title I services must be secular and neutral, must be delivered to students in all cases by public employees (not religious school teachers), and must be designed to supplement, and not supplant, the nonpublic school's instructional program, the Court concluded in *Aguilar* that the very safeguards established to prevent any use of Title I services to advance religion themselves created a risk of "entanglement" of church and state. As a result, LEAs serving children enrolled in religious schools are required to

spend substantial sums on less effective, improvised methods of instruction, such as computer-assisted instruction, instruction at public schools where the students have been transported, or teaching in "mobile" sites such as rented vans. The money spent on administering these alternative delivery systems is money that would be available for direct instruction for both public and private school students, but for the *Aguilar* decision.

Our submission is straightforward: *Aguilar* should be overruled because there is no serious danger of entanglement of church and state when public school teachers deliver secular services to students in a supplementary program under circumstances carefully designed to ensure that the instruction is not influenced by the surroundings of a religious school. Overruling *Aguilar* is consistent with principles of *stare decisis*, because that decision is inconsistent with the bulk of the Court's entanglement jurisprudence and has significant costs. Further, this case is an appropriate vehicle in which to reconsider *Aguilar*, because this Court has the authority to reexamine that decision on review of the lower courts' denial of motions for relief from judgment under Federal Rule of Civil Procedure 60(b). Principles of finality of judgments do not deprive this Court of the authority to reconsider its earlier decision when a prospective injunction remains in effect. And although we would not lightly suggest to the Court that it depart from its own law of the case, we believe that, in light of the serious, adverse effect on equal educational opportunity occasioned by *Aguilar*, there is a compelling case for overruling that decision here.

I. A. The decision in *Aguilar* reflected an approach to the problem of entanglement that was not consistent with most of the Court's previous decisions on that question. In cases such as *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971), *Hunt* v.

McNair, 413 U.S. 734 (1973), and *Committee for Public Education & Religious Liberty* v. *Regan*, 444 U.S. 646 (1980), the Court had emphasized that government is not forbidden from cooperating with religiously affiliated institutions to accomplish secular objectives. When government does work with such institutions, there must be some method of ensuring that government does not lend its aid to the advancement of religious doctrine, but the government does not necessarily enmesh itself with the affairs of a church merely because it attempts to keep its own program secular in the context of such cooperation. Certainly there is no reason to presume that the government will disregard or fail at its constitutional obligations. Rather, the danger of such entanglement must be affirmatively shown in the record or found to arise because of the inherent nature of the specific church-state relationship at issue. For even when church and state cooperate, the government will often be able to keep the two separate through routinized and readily administered methods requiring no intrusive or continuing supervision of a religious institution. This is such a case.

B. The Court in *Aguilar* held, to the contrary, that an impermissible risk of entanglement would be present if public school teachers delivered supplementary secular educational services inside religious schools. The Court concluded that the oversight of Title I teachers necessary to insulate their teaching from the influence of the surrounding religious school would create excessive entanglement. The Court also stated that the administrative contacts between public and religious school personnel necessary to operate the program would be impermissibly entangling. Those conclusions were incorrect and stemmed from an analytical approach that was not consistent with the more practical and restrained approach reflected in virtually all of the Court's other decisions.

The administrative contacts between public and religious school personnel involved in the operation of the Title I program are only the routine contacts necessary to make the program function effectively as an educational program, no more extensive than the kinds of contacts the Court had previously held to be constitutional. Moreover, such contacts are necessary even when religious school children receive Title I instruction in public school classrooms, which is plainly constitutional.

The oversight of public school teachers delivering Title I services also presents no danger of entanglement. The Establishment Clause does not prevent public school administrators from supervising their own personnel to make sure that public instruction remains secular, whether inside or outside a religious school. Because Title I services are delivered only by public personnel, there is no basis for a concern that the public schools will become involved in supervising the content of the *religious* school's curriculum or the manner in which that curriculum is delivered by *religious* school teachers. And unlike the *Lemon* case, which involved state aid to religious school teachers, there is also no reason to hypothesize that public school teachers under strict secular control will become influenced, wittingly or unwittingly, by the surroundings of a religious school so as to give their instruction a sectarian tinge.

The program invalidated in *Aguilar* was similar to the program invalidated in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), but the analytical approach in *Meek* is also inconsistent with most of the Court's decisions. *Meek* need not, however, be read as establishing a rigid rule against instruction by public school teachers inside religious schools. *Meek* is also distinguishable on its facts, for the program at issue there lacked Title I's extensive guidance safeguards. Should the Court disagree, however, that

Meek is distinguishable, it should also overrule that portion of *Meek* that is relevant to this case.

C. Since *Aguilar*, the Court has returned to its previous practical and restrained approach to entanglement claims. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court, in rejecting an Establishment Clause challenge to a federal statute permitting grants to religiously affiliated institutions but providing for supervision to ensure that the grants were not used for sectarian purposes, stressed that the situation had not been shown to involve any significant danger of entanglement in the course of such supervision. *Id.* at 615. In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the use of public funds to pay for a sign-language interpreter to accompany a deaf child in classes at a Catholic high school, and rejected a broad reading of *Meek*, stating that there is "no absolute bar to the placing of a public employee in a sectarian school." *Id.* at 12-13. Finally, in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), five Justices joined separate opinions criticizing the *Aguilar* decision and suggesting that it should be reconsidered. Those post-*Aguilar* decisions indicate that *Aguilar* is not consistent with the Court's Establishment Clause jurisprudence, and should be overruled.

D. The lack of any real danger of entanglement in Title I stands in sharp contrast to the serious, adverse consequences to equal educational opportunity that *Aguilar* has engendered. The Department of Education, the General Accounting Office, and House and Senate Committees have all concluded that *Aguilar* requires school districts to spend considerable sums on administrative costs made necessary only by *Aguilar*, sums that would otherwise be available for instructional purposes. Further, the alternative instructional methods available for nonpublic school

children after *Aguilar* (mobile site instruction, computer instruction, transportation to public schools) are all less effective than face-to-face instruction at their own schools. Those costs are not required by the Establishment Clause, and their serious consequences for education in this country provide a compelling case for overruling *Aguilar*.

II. Federal Rule of Civil Procedure 60(b) is a proper vehicle for petitioners to obtain relief from the district court's injunction based on this Court's decision in *Aguilar*. Rule 60(b) incorporates a well-established exception to the principle of finality of judgments, permitting a court to vacate a prospective injunction based on changes in the governing law. While the lower courts in this case were bound to follow this Court's controlling decision in *Aguilar*, this Court is not so bound and may reconsider its decision on review of the lower courts' correct refusal to depart from *Aguilar*. Further, this Court's reexamination of *Aguilar* on review of the denial of a Rule 60(b) motion may be the only practical and suitable means for reconsideration of that decision, since all lower courts are in any case bound by that decision, and the other possible mechanisms for this Court to reconsider the case all have serious defects. There is little reason for concern that use of the Rule 60(b) mechanism in this case will lead to abuse in future cases, because meritless attempts to gain reconsideration of precedent will be answered appropriately. And, in this case, the record presented to the courts below in the context of petitioners' Rule 60(b) motions is adequate to permit reconsideration of *Aguilar*.

ARGUMENT

I. *AGUILAR* v. *FELTON* SHOULD BE OVERRULED.

The decision to overrule a precedent of constitutional law is, of course, not to be taken lightly, particularly in an area as sensitive as that of the Establishment Clause. In our view, however, there is a compelling case for the Court to reverse its decision in *Aguilar* v. *Felton*. The outcome in *Aguilar* was not dictated by the Court's prior decisions in the area. Indeed, that decision's reliance on hypothetical concerns about the need for intensive supervision to ensure the secularity of a publicly administered program—concerns that had never arisen in years of actual administration of Title I in New York City—was inconsistent with most of the Court's prior entanglement decisions, which had stressed the need for a careful and "real world" evaluation of the administration of any program involving public aid to students at religiously affiliated educational institutions. *Aguilar*'s approach is also inconsistent with subsequent decisions of this Court, which have returned to that more practical and restrained approach. The consequences of the *Aguilar* decision are, moreover, very serious. In the judgment of the Secretary of Education, the less effective pedagogical methods available for private school students (such as teaching in rented vans, or remote computer-assisted instruction) and the large financial costs incurred in those methods have had a serious, adverse effect on the ability of students, at both public and private schools, to receive the needed remedial educational aid. See Pet. App. 17a-19a.

Accordingly, our submission is straightforward: *Aguilar* v. *Felton* should be overruled. *Aguilar* is an outlier in this area of constitutional law, not consistent with the

general thrust of the Court's other precedents in this field. No broad-ranging reconsideration of the Court's Establishment Clause decisions is necessary in order to overrule *Aguilar*, even on the narrow issue of "entanglement."

Our submission is consistent with the Court's long-standing approach to *stare decisis* in constitutional cases. Even as the Court has emphasized that adhering to precedent "'is usually the wise policy,' * * * when governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). The same is true when a decision has been "bypassed by later decisions," see *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848, 861 (1996), or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification," *Planned Parenthood* v. *Casey*, 505 U.S 833, 855 (1992). Those circumstances are present here, for *Aguilar* rested on an approach to the problem of entanglement that (mistakenly, in our view) took little account of the real facts of the case, and failed to give adequate consideration to the substantial educational and economic costs of the decision. In those respects, *Aguilar* was a marked departure from the principal thrust of the Court's entanglement decisions. Cf. *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1127-1128 (1995). And there is no reliance interest counseling continued adherence to *Aguilar*, for it is not the kind of decision that leads to private commercial ordering, the development of personal and social relationships, or patterns of "thinking and living." Cf. *Casey*, 505 U.S. at 856. Accordingly, *stare decisis* does not prevent the overruling of *Aguilar*.

A. The Court's "Entanglement" Jurisprudence Before *Aguilar* Required A Real, Rather Than Hypothetical, Danger Of Surveillance Of Religious Institutions By Governmental Authorities To State An Establishment Clause Violation

Under *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971), governmental action is consistent with the Establishment Clause if: (1) it has a secular legislative purpose; (2) it has a principal or primary effect that neither advances nor inhibits religion; and (3) it does not require excessive government entanglement with religion. In *Aguilar*, the Court held that the challenged aspects of the Title I program violated the Establishment Clause with respect to the third prong, "excessive entanglement." 473 U.S. at 409-414. In our view, that decision cannot now be reconciled with the Court's Establishment Clause jurisprudence, and should be overruled.[7]

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[7] It is indisputable that Title I has a secular purpose, and respondents have not argued otherwise. See *Aguilar*, 473 U.S. at 423 (O'Connor, J., dissenting) ("no party in this Court contends that the purpose of the statute or of the New York City Title I program is to advance or endorse religion"); cf. *Lemon*, 403 U.S. at 613; *Committee for Pub. Educ. & Religious Liberty* v. *Nyquist*, 413 U.S. 756, 773 (1973). Respondents have suggested that, under *School District of the City of Grand Rapids* v. *Ball*, 473 U.S. 373 (1985), the Title I program is invalid for having the primary effect of advancing religion. Br. in Opp. 16-19. That submission should be rejected. The overwhelmingly secular effect of Title I was so clear in *Aguilar* that the Court bypassed the "primary effect" prong of the *Lemon* test entirely and discussed only entanglement. See 473 U.S. at 423-424, 426 (O'Connor, J., dissenting). But see *id.* at 417-418 (Powell, J., concurring).

Title I differs from the "Shared Time" program at issue in *Ball* in several crucial respects that highlight the complete secularity of Title I. The Shared Time program involved public school teachers in the regular course work of the religious school, under the overall direction of the religious school; it thus presented the danger that public school

1. Since *Walz* v. *Tax Commission*, 397 U.S. 664 (1970), the Court has indicated that governmental action with a secular purpose may violate the Establishment Clause if "the end result—the effect—is * * * an excessive government entanglement with religion." *Id.* at 674. One danger of such entanglement, as the Court noted in *Walz*, is that joint religious and secular involvement in the administration of programs may require "official and continuing surveillance" of the religious institutions, to the detriment of the latter's independence from the state. *Id.* at 675; see *id.* at 691 (Brennan, J., concurring) (danger arises from "extensive state investigation into church operations and finances"). Another concern, noted by Justice Harlan, is that government participation in programs administered by religious institutions may lead to political "fragmentation" as the polity divides along religious lines. That danger is most likely when government inserts itself into "details of administration and

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teachers would significantly relieve the religious schools of their responsibility for teaching secular subjects, freeing those schools to focus their resources and energies on religious activities. See 473 U.S. at 377 ("[t]he nonpublic school administrators then decide which courses *they want to offer*") (emphasis added); *id.* at 388 ("Shared Time instructors are teaching academic subjects in religious schools in courses virtually indistinguishable from the other courses offered during the regular religious schoolday."). See also *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993) (noting that program in *Ball* provided "direct grants of government aid [and] relieved sectarian schools of costs they otherwise would have borne in educating their students"). Finally, the Shared Time program lacked Title I's extensive safeguards against use of the program to advance religion. *Ball*, 473 U.S. at 387 ("[N]o attempt is made to monitor the Shared Time courses for religious content."). Title I, by contrast, involves supplementary services provided by public school teachers under the supervision of public school authorities with safeguards to ensure the program's secularity.

planning" of a religious organization's program. *Id.* at 695 (separate opinion).

At the same time, the Court has stressed that religiously affiliated organizations play an important role in the pluralistic aspect of American life, not least in achieving the secular benefits of education. *Walz*, 397 U.S. at 673-674; *Board of Educ.* v. *Allen*, 392 U.S. 236, 247-248 (1968). It is not the case that religious institutions exist to accomplish only sectarian objectives, or that such sectarian objectives are inextricably intertwined with nonreligious ones. See *id.* at 248. Accordingly, government need not refuse to lend all support to the secular objectives of religious institutions; rather it may, as part of a broader program including both religious and nonreligious institutions, lend at least some support to the secular education of students in religious schools, as long as "the activity does not involve the State 'so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom.'" *Id.* at 249 (Harlan, J., concurring). See also *Everson* v. *Board of Educ.*, 330 U.S. 1, 17-18 (1947); *Bowen* v. *Kendrick*, 487 U.S. 589, 607 (1988) ("Nothing in our previous cases prevents Congress from * * * recognizing the important part that religion or religious organizations may play in resolving certain secular problems.").

"The test is inescapably one of degree." *Walz*, 397 U.S. at 674. And—crucially for this case—it is not to be *presumed* that public authorities delivering secular services will be unable to distance themselves from sectarian aspects of religious institutions, or that they will not honestly discharge their constitutional obligations. *Allen*, 392 U.S. at 245; see *Lemon*, 403 U.S. at 617; *Hunt* v. *McNair*, 413 U.S. 734, 745-749 (1973); *Committee for Pub. Educ. & Religious Liberty* v. *Regan*, 444 U.S. 646, 660-661 (1980). Rather, to create an Establishment Clause viola-

tion, the danger of entanglement from "the cumulative impact of the entire relationship" (*Lemon*, 403 U.S. at 614) must "inhere[] in the situation," and must be shown in the record to exist "to a substantial degree" (*id.* at 617).

In particular, the problem of entanglement arises only if there is a "realistic likelihood" that the administration of a program will require extensive supervision of the operations of a religious institution by state authorities. See *Hunt*, 413 U.S. at 747 (no violation absent "realistic likelihood" of supervision of religious institution by state authorities); *Tilton* v. *Richardson*, 403 U.S. 672, 686-688 (1971) (plurality opinion). And if a program does not involve direct aid to pervasively sectarian institutions, which would require continuing and detailed supervision to ensure that the funds are applied only to secular purposes, "the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened." *Id.* at 687; see *Regan*, 444 U.S. at 659-660.

2. Before *Aguilar*, the Court stressed that no constitutional violation exists absent an actual, rather than hypothetical, danger of entanglement between religious and secular authorities. In *Hunt* v. *McNair*, for example, the Court rejected the contention that the use of revenue bonds for the financing of a religiously affiliated college presented a danger of entanglement because of the possibility that the state educational authority might become "involved in the day-to-day financial and policy decisions of the [c]ollege." 413 U.S. at 747. In light of a state court decision circumscribing the state agency's authority to ensuring only that fees charged by the college were sufficient to meet bond payments, the Court refused to invalidate the program on the hypothetical possibility that a college might default on the bonds, leading the agency to foreclose and operate the college. *Id.* at 748-749; see *id.* at

749 ("The specific provisions of the Act * * * confine the scope of the assistance to the secular aspects of this liberal arts college and do not foreshadow excessive entanglement.").[8]

Likewise, in *Roemer* v. *Board of Public Works*, 426 U.S. 736 (1976), the Court concluded that a program of grants to private colleges, made subject to the restriction that the funds not be used for sectarian purposes, had not been shown to present any actual danger of entanglement between church and state.[9] Although there was a "process of annual interchange—proposal and approval, expenditure and review"—between the colleges and the state funding authority (*id.* at 762) (opinion of Blackmun, J.), the fact of overriding significance was "the ability of the State to identify and subsidize separate secular functions carried out at the school," without on-the-site inspections *of the activities of the religious college* being necessary to prevent diversion of the funds to sectarian purposes. *Id.* at 765 (opinion of Blackmun, J.). Since both the recipient colleges and the state authorities were "capable of separating secular and religious functions" without undue interaction (*id.* at 766) (opinion of Blackmun, J.), the program was upheld.

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[8] Contrast *Nyquist*, 413 U.S. at 794 (finding that direct financial assistance to religious schools carried "grave potential" of continuing political strife); *Levitt* v. *Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973) (finding a "substantial risk" that direct financial assistance to religious schools for student examinations would advance religion, because "the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities").

[9] Although only three Justices joined the lead opinion in *Roemer*, Justice White and then-Justice Rehnquist concurred in the judgment on broader grounds, agreeing that no danger of entanglement was present and suggesting that there is no separate "entanglement" doctrine under the Establishment Clause. 426 U.S. at 767-770.

In *Wolman* v. *Walter*, 433 U.S. 229 (1977), the Court upheld a practice under which state personnel supplied private schools with the same standardized tests used by students in public schools, and scored those tests as well. Since the private schools did not control the content or the result of the tests, there was no need for state supervision of religious schools to ensure the secular content of the tests, and therefore no actual danger of entanglement. *Id.* at 240-241 (plurality opinion). Similarly, in *Regan*, the Court upheld the use of state funds to reimburse private schools for the administration and scoring of standardized tests that the state supplied and required the schools to administer, emphasizing that the reimbursement process, including auditing, was "straightforward and susceptible to * * * routinization." 444 U.S. at 660.

The only decision before *Aguilar* suggesting a different approach towards entanglement concerns was *Meek* v. *Pittenger*, 421 U.S. 349 (1975). *Meek* invalidated a practice by which state educational authorities would "supply professional staff * * * to the nonpublic schools * * * when 'requested by nonpublic school representatives,'" to deliver secular "auxiliary services" to private school students. *Id.* at 367. The Court suggested that the State was required to be "certain" that its teachers would not advance the religious mission of the schools where they were sent, and it found at least a possibility of "inadvertent fostering of religion" even in the delivery of secular educational services by public employees when surrounded by the environment of a sectarian school, *id.* at 370-371. The Court also declined to rely on the "good faith and professionalism of the secular teachers and counselors functioning in church-related schools to ensure that a strictly nonideological posture is maintained." *Id.* at 369. It suggested that such a presumption of good faith was precluded by a companion case to *Lemon*, which had invali-

dated the use of public funds to supplement the salaries of religious school teachers who (unlike the auxiliary teachers in *Meek*) were subject to the control and discipline of the religious school's authorities. *Id.* at 369-370; cf. *Lemon*, 403 U.S. at 617-619. *Meek* is, therefore, somewhat inconsistent with the Court's other entanglement decisions. See pp. 30-33, *infra* (discussing *Meek*).

B. *Aguilar* Was A Departure From Most Of The Court's Previous Entanglement Cases, And Incorrectly Decided That Delivery Of Title I Services In Religious Schools Presents A Danger Of Entanglement

In *Aguilar*, the Court held unconstitutional the use of Title I funds to send public school teachers into religious schools to provide remedial instruction with respect to purely secular subjects. The Court's ruling was premised on two considerations. First, although the Court noted that New York City's Title I program had safeguards to prevent public funds from being used, "intentionally or unwittingly, to inculcate the religious beliefs of the surrounding parochial school," it concluded that those safeguards themselves created a constitutional difficulty, in that the supervision necessary to ensure that those impermissible effects would not occur "inevitably results in the excessive entanglement of church and state." 473 U.S. at 409. The Court believed that "pervasive monitoring by public authorities in the sectarian schools" was necessary to "ensure the absence of a religious message" in the Title I services. *Id.* at 412-413.

Second, the Court concluded that the "administrative cooperation that is required" between public and religious school personnel in the everyday implementation of the program "entangles church and state in still another way that infringes interests at the heart of the Establishment

Clause." 473 U.S. at 413. As part of that cooperation, "[a]dministrative personnel of the public and parochial school systems must work together in resolving matters related to schedules, classroom assignments, problems that arise in the implementation of the program, requests for additional services, and the dissemination of information regarding that program." *Ibid.* Furthermore, "the program necessitates 'frequent contacts between the regular and the remedial teachers (or other professionals), in which each side reports on individual student needs, problems encountered, and results achieved.'" *Ibid.*[10]

We address those considerations in reverse order. First, the administrative contacts involved in implementation of Title I are no greater than the routine contacts that the Court had, in the past, recognized as permissible, and are necessary even if the Title I instruction takes place away from religious schools—in which case no Establishment Clause problem is present. Second, even under the Court's Establishment Clause jurisprudence before *Aguilar*, the Court should not have found excessive entanglement on the basis of the hypothetical (indeed nonexistent) possibility that intrusive supervision of the religious school would be necessary to ensure that public school teachers did not deliver a religious message. In addition, *Aguilar* is not consistent with subsequent Establishment Clause decisions, which have returned to the pre-*Aguilar* requirement of an actual danger of *entanglement*—not contact—between church and state.

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[10] Justice Powell also suggested that the "aid to religion" he perceived in Title I carried a "risk of political divisiveness," in that "any proposal to extend direct governmental aid to parochial schools alone is likely to spark political disagreement from taxpayers who support the public schools, as well as from nonrecipient sectarian groups, who may fear that needed funds are being diverted from them." 473 U.S. at 416-417 (concurring opinion).

1. This Court has made clear that "[s]eparation [between church and state] cannot mean absence of all contact." *Walz*, 397 U.S. at 676. Some contact is acceptable, indeed inevitable. See *Lemon*, 403 U.S. at 625. When the administrative contacts needed to carry out a secular program are "straightforward and susceptible to * * * routinization," there is no excessive entanglement on the face of the program, and no reason to presume that such entanglement will inevitably occur in its application. *Regan*, 444 U.S. at 660-661 (finding no entanglement in contacts necessary to administer a program of state reimbursement to religious schools for administering and grading state-prescribed examinations). Thus, in *Walz*, 397 U.S. at 674-676, the Court found no excessive entanglement in the routine (and inevitable) contacts between church and state over the administration of the local tax code exemptions. See *Lemon*, 403 U.S. at 614 (emphasizing that there was no entanglement in *Walz* even though the State "had a continuing burden to ascertain that the exempt property was in fact being used for religious worship"). Nor was entanglement found in *Mueller* v. *Allen*, 463 U.S. 388 (1983), which upheld state tax deductions for textbooks, even though state officials were required to disallow deductions for instructional books and materials to be used for the teaching of religious doctrine. Making such straightforward decisions between religious and nonreligious materials, held the Court, did not amount to the "comprehensive, discriminating, and continuing state surveillance" that constitutes impermissible entanglement. *Id.* at 403.

The "contacts" between state officials and nonpublic school administrators in the delivery of Title I services are also straightforward and routine. Those contacts (both before and after *Aguilar*) generally fall into three categories: (1) disseminating information about Title I to

private school administrators, (2) consulting with private school officials about the Title I services to be provided, and (3) resolving "individual student needs, problems encountered, and results achieved." *Aguilar*, 473 U.S. at 413; see J.A. 59, 647. Those contacts give religious school officials no control over the content of the program (see J.A. 647; 34 C.F.R. 200.11(b)(3); *Wheeler* v. *Barrera*, 417 U.S. 402, 424 (1974)), nor do they involve Title I personnel in the affairs of the religious schools. The Title I supervisors have only casual and periodic contact with nonpublic school administrators and little, if any, contact with nonpublic school teachers. Title I supervisors review and evaluate only the performance of the Title I teacher in the Title I classroom, and neither the religious school program nor its instructional material is subject to public supervision. See generally J.A. 59-63; see also J.A. 50-51, 52-55, 647. Before *Aguilar*, the public instructors who went into religious schools were supervised by field personnel, who attempted to make no more than one unannounced visit per month. The field supervisors, in turn, reported to public program coordinators, who also paid very occasional unannounced supervisory visits to monitor Title I classes in the religious schools. See *Aguilar*, 473 U.S. at 407; J.A. 645 (similar number of supervisory visits after *Aguilar*). Those contacts are no more intrusive than, and are equally as routine as, the contacts upheld as permissible by the Court before *Aguilar* in *Walz*, *Regan*, and *Mueller*.[11]

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[11] This Court noted in *Aguilar* that the public school professionals involved in the Title I program were directed to avoid involvement with religious activities conducted within the private schools and to bar religious materials in their classrooms. All materials and equipment used in the programs funded under Title I were supplied by public school personnel and were used solely in those programs. The public school personnel were also solely responsible for the selection of

Moreover, the contacts involved are inevitably required however Title I services are provided to nonpublic school students—whether in religious schools, public schools, mobile units, or through computer-assisted instruction. At some point, public and private school teachers must discuss the precise needs of individual students and the nature of the public services to be delivered to the students. Under the logic of *Aguilar*'s emphasis on contacts, however, the decision would bar any implementation of Title I for religious school children. Yet clearly, the Court had no such result in mind, for it had already upheld the provision of state-funded counseling, therapeutic, and remedial services to religious school students away from their schools. *Wolman*, 433 U.S. at 247-248; see also *Walker* v. *San Francisco Unified Sch. Dist.*, 46 F.3d 1449, 1460-1461 (9th Cir. 1995); *Aguilar*, 473 U.S. at 418-419 (Powell, J., concurring); *id.* at 430-431 (O'Connor, J., dissenting). The routine administrative contacts necessary to make Title I services available to religious school students cannot be a sufficient basis for invalidation of the program, even insofar as the services are delivered inside religious schools.

2. a. The federal government and New York City have recognized that Title I services, wherever they are delivered, must be entirely secular in content and must be separate from (and supplementary to) the ordinary instruction of a religious school. The services are therefore designed and delivered by public personnel, who have only administrative and routinized contacts with the nonpublic

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the students. Additionally, they were informed that contact with private school personnel should be kept to a minimum. Finally, the administrators of the religious schools were directed to clear the classrooms used by the public school personnel of all religious symbols. *Aguilar*, 473 U.S. at 407. Those principles also apply to the current program. See J.A. 644-648.

school authorities. But for *Aguilar*, the services would be delivered to certain students inside a religious school because that is where those students are for most of the day. The only question is whether the mere fact that Title I services might be provided inside religious school buildings, by itself, presents a serious danger of entanglement.

The Court in *Aguilar* believed that it would take a "comprehensive system of supervision" to "ensure that teachers in parochial schools were not conveying religious messages to their students," and that such "a comprehensive system * * * would inevitably lead to an unconstitutional administrative entanglement between church and state." See 473 U.S. at 410. The Court relied in part on *Lemon* for that conclusion. *Id.* at 410, 412. *Lemon*, however, involved salary supplements to *religious* school teachers; the Court in *Lemon* observed that those teachers, who had been hired by, and were under the discipline of, a religious authority, were inherently likely to infuse their instruction with religious content (wittingly or not). 403 U.S. at 618-619. Comprehensive monitoring was required to prevent religious school teachers from giving religious content to their own school's instructional program. That monitoring, however, was necessary not because the instruction occurred inside a religious school building, but because the instruction was offered by religious schools and delivered by teachers of those schools.

By contrast, Title I services are delivered directly to students by *public school* teachers under the supervision of *public school* authorities. Those authorities' supervision of their own personnel entails no relationship between the government and religious authorities and, as a result, no intrusion of the government into church matters (including the religious school's instructional content). See *Aguilar*, 473 U.S. at 421 (O'Connor, J., dis-

senting) ("The Court greatly exaggerates the degree of supervision necessary to prevent public school teachers from inculcating religion."). The supervision required is no different, in principle, from the supervision necessary to ensure that teachers in the public schools comply with this Court's school prayer decisions or, indeed, to prevent impermissible religious effects even when Title I classes for religious school students are taught in public school classrooms. The Constitution simply does not prohibit such "entanglement" between the government and its own public employees. See *Wolman*, 433 U.S. at 246-248.

In addition, the "unannounced supervisory visits" by public school authorities described by the Court in *Aguilar* (see 473 U.S. at 407) were no more intrusive than the monitoring occasioned by many public regulatory programs, such as state accreditation of schools and compliance with fire code requirements; and in any event, the purpose of those visits was to monitor the public instructors, not the religious school teachers. The religious school merely supplied a classroom in specified condition and allowed access to that classroom by public school teachers and supervisors; there was accordingly no reason for a Title I supervisor to examine anything other than that classroom. Not surprisingly, therefore, there was no indication in the record of any friction caused by the occasional visits by Title I supervisors to Title I classrooms.[12]

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[12] The Court also expressed concern about Title I supervisors "prowling the halls" of religious schools. 473 U.S. at 414. That concern, we submit, was entirely theoretical. The *Aguilar* record reflects no such "prowling," even though the Title I program had operated in New York City for almost two decades; there was no showing that Title I required a "permanent and pervasive state presence in the sectarian schools," *id.* at 412-413. The Court also suggested that, because classrooms were required to be cleared of religious symbols, there might be

At bottom, then, the decision in *Aguilar* must be based on the possibility that public school teachers might internalize their surroundings when they are inside religious schools, and that supervision of those teachers would therefore be necessary "to guard against the infiltration of religious thought." 473 U.S. at 413. We submit that—contrary to the situation in *Lemon*—there was simply no basis in the *Aguilar* record (or elsewhere) for any concern that professionally trained public school teachers, under secular control, delivering secular services in a school whose religion they might not even share (see J.A. 341, 642-643) would succumb to unconscious pressure to deliver a religious message in their instruction. To invalidate a remedial program on such speculative concerns is contrary to the practical approach of virtually all of the Court's Establishment Clause decisions.

b. The Court in *Aguilar* suggested (473 U.S. at 410, 412-413) that the case was controlled by *Meek* v. *Pittenger*, 421 U.S. 349 (1975). The auxiliary services program invalidated in *Meek* is similar in several respects to Title I, and *Meek* did (like *Aguilar*) find a danger of entanglement even in "the absence of any record support for the notion that public school teachers would attempt to inculcate religion simply because they temporarily occupied a parochial school classroom, or that such instruction would produce political divisiveness." See *Aguilar*, 473 U.S. at 427 (O'Connor, J., dissenting). Thus, the analytical

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friction between public and religious school authorities "as to what is and what is not a 'religious symbol.'" *Ibid.* In fact, the question of "what is a religious symbol" would not require *ongoing* interaction between public and religious school administrators. Once agreement is reached about the removal of certain symbols from a classroom, the question need not be revisited. Cf. *Mueller*, 463 U.S. at 403 (no danger of entanglement in state tax authorities' duty to disallow deductions for religious materials).

approach in *Meek* to claims of entanglement, like that in *Aguilar*, is inconsistent with the Court's other decisions in this area.[13]

Nonetheless, the Court need not read *Meek* as resting on a *per se* rule that all secular instruction delivered directly to students by public personnel inside religious schools is unconstitutional. Just one year before *Meek*, in *Wheeler* v. *Barrera*, 417 U.S. 402 (1974), the Court was faced with the question of the constitutionality, in the abstract, of such a Title I program. In that case, an LEA had declined to offer instructional services in religious school classrooms, arguing that to do so would violate the Establishment Clause. The Court declined to resolve that issue, and stated that the question should be decided on the basis of "a careful evaluation of the facts of the particular case." *Id.* at 426. The Court observed that "the First Amendment implications may vary according to the precise contours of the plan that is formulated." *Ibid.*

Five Terms after *Meek*, in *Committee for Public Education & Religious Liberty* v. *Regan*, the Court explicitly rejected a broad interpretation of *Meek*:

> *Meek* * * * is said to have held that any aid to even secular educational functions of a sectarian school is forbidden, or more broadly still, that any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of

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[13] *Meek* relied on *Public Funds for Public Schools* v. *Marburger*, 358 F. Supp. 29 (D.N.J. 1973), aff'd summarily, 417 U.S. 961 (1974). *Marburger*, however, involved a program in which public funds were provided to nonpublic schools to enable them to hire public school personnel for remedial services that the nonpublic schools deemed appropriate. Thus, when the *Marburger* program operated in the religious schools, it was under the control of the religious schools rather than the public schools.

> its activities. * * * [T]hat case was simply not understood by this Court to stand for [such a] broad proposition.

444 U.S. at 661. Similarly, *Meek* does not require a broad reading that instructional services delivered by public school teachers inside religious schools are inherently suspect.

Further, even if *Meek* was correctly decided on its facts (a question the Court need not reach here), there are several important differences between *Meek* and this case. First, the Title I program is governed by specific regulations and guidelines governing services to private school children that are made known to Title I personnel and the nonpublic schools as well. See J.A. 50-55, 643. This has the beneficial effect of routinizing the conduct of the program and eliminating the need for *ad hoc* judgments about the relations between the religious school and the Title I program. See *Regan*, 444 U.S. at 660 (upholding program where it is "straightforward and susceptible to * * * routinization"). In *Meek*, by contrast, the principles for administering the auxiliary services program had not been so routinized, and so there was a potential for "controversy between the Commonwealth and religious authorities over the extent of the teachers' responsibilities and the meaning of the legislative and administrative restrictions on the content of their instruction." *Meek*, 421 U.S. at 372 n.22.

Second, the Title I program is encompassed in a single statute that provides aid to students in both public and nonpublic schools according to a fixed statutory formula. See 20 U.S.C. 6321(a), 6313(c). This obviates any possibility that the program might foster chronic controversy over the amount of aid to be given to nonpublic school students. Indeed, there is no indication in the record that

Title I has precipitated acrimonious debate in the political arena. By contrast, the program in *Meek* required aid for public and nonpublic school students through separate statutory schemes requiring separate annual appropriations decisions. See 421 U.S. at 352, 372. That perennial review process created risks of "repeated confrontation between proponents and opponents of the * * * program [and] * * * political fragmentation and division along religious lines" (*id.* at 372).

In sum, aside from the possibility that public school teachers might become influenced by the surrounding "atmosphere dedicated to the advancement of religious belief" (421 U.S. at 371)—a concern that, as we have suggested, is entirely hypothetical and surely should not be presumed—many of the important factors in *Meek* are not present in this case. Accordingly, *Meek* did not dictate the result in *Aguilar*, and does not prevent *Aguilar* from being overruled. Should the Court disagree, however, and conclude that the auxiliary services program invalidated in *Meek* is not distinguishable from this case, we believe that aspect of *Meek* should also be overruled.

C. Since *Aguilar*, The Court Has Returned To Its Previous Approach To Entanglement Problems

The Court's decisions subsequent to *Aguilar* have returned to the more restrained and practical approach to entanglement concerns. In *Bowen* v. *Kendrick*, 487 U.S. 589 (1988), the Court rejected a facial constitutional challenge to the Adolescent Family Life Act (AFLA), 42 U.S.C. 300z *et seq.*, which provides for grants to public and nonprofit organizations, including organizations with religious affiliations, for services relating to adolescent sexuality and pregnancy. In rejecting the contention that the AFLA has a primary effect of advancing religion, the Court noted that the use of granted funds to promote

religious doctrine was contrary to the intent of the legislation, and that grantees are required to undergo evaluations of their services by the government "to ensure that federal funds are not used for impermissible purposes." 487 U.S. at 615.

Concerning entanglement, the Court observed that federal "monitoring of AFLA grants is necessary if the [government] is to ensure that public money is to be spent in the way that Congress intended and in a way that comports with the Establishment Clause." *Kendrick*, 487 U.S. at 615. Nonetheless, the Court concluded that, at least on the facial challenge presented there, where it could not be assumed that grants would necessarily be made to pervasively sectarian institutions, there was no basis for concluding that "this type of grant monitoring [would] amount to 'excessive entanglement.'" *Id.* at 617. Thus, in *Kendrick*—which concerned a program that, like the Title I program, does *not* require direct financial assistance to pervasively sectarian institutions—the Court found no basis for a presumption that the government would have to enmesh itself in disputes over religious doctrine or in church administration. The Court left open for remand whether, in particular cases, it might be shown that federal funds had been granted improperly to pervasively sectarian groups or had been used by recipients for religious activities. *Id.* at 620-622.[14]

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[14] In *Kendrick*, the Court suggested that *Aguilar* was a case about "aid to parochial schools," and that "the elementary and secondary schools receiving aid were 'pervasively sectarian.'" 487 U.S. at 616. With respect, we submit that *Aguilar*—and Title I generally—do not involve aid *to* parochial schools at all (unlike, for example, the Shared Time program invalidated in *Ball*). Whether or not the religious schools in New York City are pervasively sectarian, those schools would not "receiv[e] aid" under Title I even if the instructional services were delivered inside their schools. Accordingly, as was true in *Kend-*

In *Zobrest* v. *Catalina Foothills School District*, 509 U.S. 1 (1993), the Court upheld the use of public funds to pay for a sign-language interpreter to accompany a deaf child in classes at a Catholic high school. Although the school district in that case argued that *Meek* prohibited the use of public funds for such a purpose, the Court rejected such a broad reading of *Meek*, and stated that "the Establishment Clause lays down no absolute bar to the placing of a public employee in a sectarian school." *Id.* at 12-13. Although the Court did not expressly discuss the entanglement doctrine, it distinguished *Meek* as a case in which the religious schools were "reliev[ed] * * * of an otherwise necessary cost of performing their educational function," *id.* at 12, a description that cannot apply to this case, since Title I services must be supplementary.

Finally, in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, 512 U.S. 687 (1994), five Justices expressly criticized *Aguilar* as inconsistent with the Court's Establishment Clause jurisprudence. Justice O'Connor stated that the Court "should, in a proper case, be prepared to reconsider *Aguilar*, in order to bring our Establishment Clause jurisprudence back to what I think is the proper track—government impartiality, not animosity, towards religion." *Id.* at 717-718 (opinion concurring in part and concurring in the judgment). Justice Kennedy suggested that *Aguilar* "may have been erroneous," and that "it may be necessary for [the Court] to reconsider [that decision] at a later date," in order to remove the constitutional cloud from a "neutral aid scheme, available to religious and nonreligious alike," such that minority religions "would have no need to seek special accommodations." *Id.* at 731 (opinion concurring in the judgment).

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rick, the Court here need not consider any entanglement concerns raised by aid to pervasively sectarian institutions.

Justice Scalia, joined by the Chief Justice and Justice Thomas, "heartily agree[d]" that *Aguilar*, "so hostile to our national tradition of accommodation, should be overruled at the earliest opportunity." *Id.* at 750 (dissenting opinion).

Kendrick and *Zobrest*, as well as the separate opinions in *Kiryas Joel*, recognize that the question of entanglement is, inevitably, related to the question of impermissible religious effects. If there is no serious concern that the benefits of a secular program will advance religion—for example, because the program remains firmly under state control and must be put to exclusively secular purposes—then the danger of entanglement is likely to be minimal as well. On the other hand, there may be situations in which—because of the direct participation of religiously affiliated institutions in a program—it can be shown that the prevention of an impermissible effect (the use of public funds to inculcate religious doctrine) requires intrusive state supervision of a religious institution. See, *e.g.*, *Lemon*, *supra*. That, however, is fundamentally an empirical question, which cannot be answered *a priori*. Nor should any danger of entanglement be assumed where the inculcation of religious doctrine is highly implausible—as here, where the services are delivered by public school personnel, not teachers dedicated to the spiritual mission of a religious school.

D. *Aguilar* Has Had Serious Adverse Economic and Educational Effects

In contrast to the insubstantial danger that public and religious school authorities will become enmeshed in divisive conflict should public school teachers resume delivery of Title I services in nonpublic schools is the very real cost to the education of both public and nonpublic school children that was made necessary by the decision in *Aguilar*. The alternatives to instruction at a child's own school —computer-assisted instruction, instruction in a rented unit, transportation to a public school—are often less effective. The attendant financial costs, moreover, are considerable, and in a world of finite resources, money spent for renting a neutral site means less money for instruction. Those costs, of course, would have to be borne if the Constitution required them, but for the reasons we have given, we believe that they are not required. And since they are not, the very real loss to the educational opportunities for needy and failing students presents a compelling reason for overruling *Aguilar*.

The considerable costs of *Aguilar*, in both educational and economic terms, have been documented. An assessment of Title I services delivered to private school students commissioned by the Department of Education in 1993 concluded that *Aguilar* "makes it difficult to achieve qualitative equitability" for nonpublic school students and "will continue to make equitability a problematic objective." United States Dep't of Education, *Chapter 1 Services to Private Religious School Students* viii (Aug. 1993) (lodged with the Clerk). That study observed that "vans and portable classrooms can be cramped and noisy, permitting little movement or activity and typically providing limited space for storing materials and supplies," and that "[i]nadequate heating, noise from electrical

generators or traffic, immovable tables and benches, and physical isolation test the inventiveness of even the most seasoned and creative teachers." *Id.* at 21. (One case study of "van teaching" noted that the class ended with the teacher leading the children "out into the cloudy 10-degree day and across 100 yards of an ice-covered parking lot to return to their school." *Id.* at 23.) The study also noted that transportation of religious school students to other sites raises concerns about the students' safety and conflict with their schools' instruction schedules, and that computer-assisted instruction has considerable disadvantages, including the physical isolation of the students and inadequate communication about student work and progress. *Id.* at 33-34. See also H. R. Rep. No. 95, 100th Cong., 1st Sess. 30-31 (1987) (noting substantial decrease in quality of Title I services provided to private school children since *Aguilar* was decided); S. Rep. No. 222, 100th Cong., 1st Sess. 14 (1987) (similar); J.A. 316-333, 614-640 (City's affidavits detailing flaws with all instructional methods tried for nonpublic school students since *Aguilar*).

Studies have also noted the considerable fiscal impact of *Aguilar* on school districts' ability to provide services to both public and private school students. A 1989 General Accounting Office study of the effects of *Aguilar* concluded that $105 million had been or would be spent on capital expenses since that decision to comply with *Aguilar* (not including expenditures in California). General Accounting Office, *Compensatory Education*: Aguilar v. Felton *Decision's Continuing Impact on Chapter 1 Program* 2-3 (1989) (lodged with the Clerk); see *id.* at 18-22. Those expenditures greatly exceeded a 1989 appropriation of $19.8 million made by Congress to assist school districts in paying for compliance with *Aguilar*. *Id.* at 2,

22-23.[15] New York City's affidavits also demonstrated that compliance with *Aguilar* is very costly. J.A. 333, 336-337 ($93 million in 1986-1994), 651-657.

Experience has therefore shown that *Aguilar* has led to considerable cost to education and the public fisc but has yielded little constitutional benefit, in the sense of preventing any real entanglement between governmental and religious institutions. The constitutional value of ensuring that government does not advance or become enmeshed in religion simply does not require that public school teachers be forbidden from entering a religious school to deliver a purely secular program firmly under state control. Accordingly, and in light of the importance of equal educational opportunity, we submit that *Aguilar* should be overruled.

II. RULE 60(b) IS A PROPER VEHICLE FOR OBTAINING THE RELIEF PETITIONERS SEEK

The petitioners' requests that *Aguilar* be overruled come to this Court in an unconventional posture, on certiorari from the lower courts' refusal to vacate an injunction that was entered on remand from this Court's prior decision in the same case. As we explained above, decisions subsequent to *Aguilar* (*Kendrick* and *Zobrest*), followed by the separate opinions in *Kiryas Joel*, indicate that *Aguilar* is inconsistent with the Court's entanglement decisions both before and since. That circumstance warrants reexamination of *Aguilar* by this Court. The lower courts were, of course, bound to follow this Court's directly controlling precedent, as they recognized. But

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[15] Because of the high costs of complying with *Aguilar*, Congress has continued to authorize and appropriate considerable sums to assist LEAs in that compliance. See 20 U.S.C. 6321(e), 6302(e). We are informed that Congress has appropriated about $300 million since Fiscal Year 1989 for that purpose.

this Court may nonetheless reconsider and overrule *Aguilar* on review of the lower courts' denial of relief under Rule 60(b).

A. This Court May Reconsider *Aguilar* On Review Of The Lower Courts' Denial Of Relief Under Rule 60(b)

1. Rule 60(b) "reflects and confirms the courts' own inherent and discretionary power, 'firmly established in English practice long before the foundation of our Republic,' to set aside a judgment whose enforcement would work inequity." *Plaut* v. *Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1460 (1995) (quoting *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co.*, 322 U.S. 238, 244 (1944)). "Since Lord Bacon's day a decree in equity may be reversed or revised for error of law, * * * [a]nd this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation." *Hazel-Atlas*, 322 U.S. at 259 (Roberts, J., dissenting).

There can be no dispute, therefore, that federal courts have the authority under Rule 60(b) to vacate injunctive relief that is no longer required in light of intervening decisional law. That much was settled by *Pasadena City Board of Education* v. *Spangler*, 427 U.S. 424, 433-435 (1976), where the Court held that a district court should have modified a school desegregation decree forbidding any "majority minority" schools, once this Court held, in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that the Equal Protection Clause does not impose such an inflexible requirement in school desegregation cases. Cf. *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 390 (1992) (district court has authority, under appropriate circumstances, to modify terms of consent decree no longer required by decisional law). "[A] sound judicial discretion may call for the modification of

the terms of an injunctive decree if the circumstances, whether of law or fact, obtaining at the time of its issuance have changed, or new ones have since arisen," and "the court cannot be required to disregard significant changes in law or facts if it is 'satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.'" *System Fed'n No. 91, Ry. Employees' Dep't, AFL-CIO* v. *Wright*, 364 U.S. 642, 647 (1961) (quoting *United States* v. *Swift & Co.*, 286 U.S. 106, 114-115 (1932)); see also *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 435-436 (1856) (holding that injunction should not be enforced because of intervening changes in statutory law).

Rule 60(b) therefore permits a district court to vacate an injunction in light of changes in this Court's decisions, as long as there is no directly controlling precedent of this Court that continues to mandate that injunction. Assume, for example, that in this case, respondents had brought their constitutional challenge to Title I in 1978, that the district court had ruled in their favor based on *Meek* (a similar but not identical case) and entered injunctive relief, and that the injunction had not been appealed. Had this Court never decided the precise issue raised in *Aguilar*, the district court could have looked to *Kendrick* and *Zobrest*, concluded that the approach taken to entanglement problems in *Meek* no longer prevailed in this Court, and vacated an injunction forbidding the expenditure of Title I funds for the salaries of public school teachers who deliver supplemental services in religious schools.

The difficulty here arises from the fact that the Court has decided the precise issue in this very case. Even if this Court would not decide that issue in the same way today, the lower courts would be bound to follow this Court's directly controlling decision. *Rodriguez de*

Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989); see also *Vendo Co.* v. *Lektro-Vend Corp.*, 434 U.S. 425, 427-428 (1978) (per curiam). The lower courts' obligation in this case to follow *Aguilar*, however, followed from *stare decisis* and law of the case, and not from principles of finality of judgments or a lack of authority under Rule 60(b).[16] As the Court made clear in *Standard Oil Co. of California* v. *United States*, 429 U.S. 17 (1976) (per curiam), a district court may entertain a motion for relief from its judgment under Rule 60(b) even if that judgment has been affirmed by this Court; "[l]ike the original district court judgment, the appellate mandate relates to the record and issues then before the court, and does not purport to deal with possible later events. Hence, the district court is not flouting the mandate by acting on the motion." *Id.* at 18.

This Court, however, has the authority to reconsider its own precedents, notwithstanding the doctrines of *stare decisis* and law of the case. Neither doctrine is an "inexorable command," and the Court has overruled its decisions when they were shown to be incorrectly reasoned and inconsistent with other decisional authority. See *Payne*, 501 U.S. at 827-829; *Fulton Corp.*, 116 S. Ct. at 860-861; *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793, 1811-1812 (1996) (Ginsburg, J., dissenting). Appellate courts (including this Court) have the authority to reconsider their precedents even in the same case, for

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[16] Indeed, once this Court decided *Aguilar*, all district courts in the country were bound by that decision, whether or not they were faced with pending litigation challenging the constitutionality of Title I. That is true even though later cases of this Court might have eroded *Aguilar*. See *Rodriguez*, 490 U.S. at 484 ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls.").

law of the case, like *stare decisis*, is a rule of policy rather than authority, and courts may depart from the law of the case when "controlling authority has since made a contrary decision of the law applicable to [the] issues." *White v. Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967). See *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912) (law of the case "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"); *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (same). Cf. *Wyoming* v. *Oklahoma*, 502 U.S. 437, 446 (1992) ("Of course, we surely have the power to accede to Oklahoma's request at this late date * * * to depart from our prior rulings."); *Arizona* v. *California*, 460 U.S. 605, 618 (1983).

It is not dispositive that the standard of appellate review of denials of relief under Rule 60(b) is frequently referred to as "abuse of discretion." See *Wright*, 364 U.S. at 648. As the Court has explained, a district court "abuses its discretion" whenever it makes a decision based on erroneous legal principles. See *Koon* v. *United States*, 116 S. Ct. 2035, 2047 (1996); *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990). Thus, if this Court determines that *Aguilar* is no longer good law, it may announce the correct rule of law and direct the lower courts to grant the requested relief, even though the lower courts could not have done so on their own, in anticipation of that decision.

There is, to be sure, a legitimate concern that parties bound by injunctions might invoke Rule 60(b) for the purpose of obtaining appellate reconsideration of a precedent, even when there is little likelihood that the appellate court will in fact reverse itself. In our view, however, those concerns are adequately met by the doctrines of *stare decisis* and law of the case, which ensure that courts do not lightly reconsider their legal rulings. Meritless contentions that precedents should be overruled

will be answered by decisions refusing to take that step. There is no need for an additional door-closing device to prevent courts from correcting earlier errors of law. That point is well shown by cases like this one, in which petitioners seek relief from a judgment based on a decision of this Court that has been called into question, but not expressly overruled, by subsequent decisions of this Court, and that imposes significant educational and economic costs. In such a circumstance, this Court should not be disabled from reexamining its decision.

2. It is doubtful whether, absent the avenue for relief under Rule 60(b) that petitioners have invoked, this Court would ever be presented with a suitable vehicle for reconsideration of *Aguilar*. As we have noted (p. 6 n.6, *supra*), private plaintiffs have challenged the provision of Title I services to religious school students even after *Aguilar* as inconsistent with the Establishment Clause, but those contentions have been uniformly rejected in the lower courts. The losing plaintiffs have not sought this Court's review, and, because the school districts and the Secretary prevailed in those cases, there has been no opportunity to request this Court to reconsider *Aguilar*.[17]

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[17] In *Helms* v. *Cody*, 856 F. Supp. 1102 (E.D. La. 1994), a district court invalidated Louisiana's special education statute, insofar as it allowed state-paid teachers to teach inside pervasively sectarian schools. *Id.* at 1121-1122. The court subsequently upheld the application in one parish of a federal program under which both public and nonpublic schools receive instructional equipment. *Helms* v. *Cody*, 1997 WL 35283 (E.D. La. Jan. 28, 1997). Even if there might be cases pending that are somewhat similar to *Aguilar*, such cases do not necessarily present suitable vehicles for full reconsideration of *Aguilar* by this Court. As we have explained, each of this Court's entanglement decisions is crucially dependent on the facts of the case, and there might be significant factual differences between a current state program and Title I, just as there were significant differences between the programs at issue in *Meek* and *Aguilar*. Indeed, the district court that invali-

Further, because the Secretary of Education recognizes the binding authority of *Aguilar*, he is obligated to deny funds to LEAs for the purpose of sending public school teachers to deliver Title I services in religious schools. Parties other than the ones here, such as a school district other than New York, might conceivably bring an action against the Secretary to challenge such a funding decision, but the Secretary's decision would undoubtedly be upheld as consistent with, if not compelled by, *Aguilar*, and in any event all lower courts in the Nation would be obligated to follow *Aguilar*. And because the Secretary supports reconsideration of *Aguilar*, there would be a problem in such a case of identifying a nongovernmental defendant ready, willing, and able to undertake the cost of presenting a full defense against reconsideration of *Aguilar*, and of preparing a record to that end. The district court in this case, however, compiled a full record when the case was previously litigated, and the City updated the record with an extensive affidavit in support of its Rule 60(b) motion. See 96-553 Pet. App. A27-A101.

The only other possible method by which the continuing vitality of *Aguilar* could be tested directly would be for the City of New York to place itself in contempt by deliberately violating the terms of the district court's injunction, and then to seek review of the contempt sanction in the appellate courts, including this Court. In practical effect, however, that could not occur, because the Secretary of Education would not provide the City with funds for a Title I program that included sending teachers into religious schools in violation of *Aguilar*. Moreover,

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dated the Louisiana special education program relied principally on *Ball* rather than *Aguilar*, and it found that the State's financial assistance "is given directly to the schools themselves, and not indirectly through the parents or students." 856 F. Supp. at 1120-1121.

this Court has held that one seeking relief from an injunction *must* ordinarily move for such relief rather than disobey the injunction and place himself in contempt. *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Therefore, as the district court found, a motion for relief from an injunction is "far preferable" to a requirement that the City place itself in contempt. Pet. App. 9a.[18]

B. There Is No Deficiency In The Record Preventing This Court's Reconsideration of *Aguilar*

The record in this case is adequate to permit this Court to reconsider *Aguilar*. That record includes the entire record compiled in the earlier proceedings in this case. Petitioners also submitted, with their Rule 60(b) motions, affidavits detailing the additional financial costs necessary to implement post-*Aguilar* delivery methods for Title I services and explaining the educational deficiencies in those methods. J.A. 306-346, 601-657; see also Pet. App. 17a-19a (statement by Secretary of Education about

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[18] If the Court has doubts about the appropriateness of Rule 60(b) as a mechanism for reconsideration of *Aguilar*, we suggest that the Court treat the petitions for a writ of certiorari as petitions for rehearing of the Court's prior ruling in this case (see, *e.g.*, *Gondeck* v. *Pan American World Airways, Inc.*, 382 U.S. 25 (1965) (per curiam) (granting petition for rehearing three years after prior denial of rehearing)) or as motions to recall and modify the Court's prior judgment (see, *e.g.*, *Cahill* v. *New York, New Haven & Hartford R.R.*, 351 U.S. 183 (1956) (granting motion to recall and amend the Court's judgment)). Cf. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 400 U.S. 939 (1970) (treating application for a stay and opposition thereto as a petition for a writ of certiorari and opposition thereto, and granting certiorari). The Court has, in the past, reconsidered and reversed prior decisions on petitions for rehearing. See *Reid* v. *Covert*, 354 U.S. 1 (1957); *Jones* v. *Opelika*, 319 U.S. 103 (1943) (per curiam). In one way or another, we believe that this Court necessarily has the power to modify a prior judgment, such as *Aguilar*, that has continuing, prospective effect.

adverse educational effects of post-*Aguilar* instruction methods).

In the courts below, respondents suggested that the record was deficient in two ways. First, they argued that there is need for an evidentiary hearing on the financial condition of the Catholic schools whose children participate in Title I, presumably to focus on whether Title I funding is necessary to the schools' survival. Resp. C.A. Br. 25-26. That issue, however, has nothing to do with whether instruction inside religious schools is constitutional. Title I services are not intended to aid private schools, and they are supplementary to the basic curriculum of those schools. Hence, no record development is necessary on that issue.

Second, respondents argued below that there are open issues regarding the religious mission of the Catholic schools where Title I services would be delivered. Resp. C.A. Br. 27. There is in fact no genuine dispute on that issue, which was extensively addressed in the affidavits submitted in the first round of *Aguilar* litigation (see J.A. 256-267) and, again, in affidavits filed in support of the Rule 60(b) motions (see J.A. 659-669, 684-685). In any event, we may assume for present purposes that the Catholic schools have a religious mission and, indeed, are pervasively sectarian, for that does not affect the outcome of this case.[19] The decision in *Aguilar* was based on a concern that public school teachers engaged in secular education would be influenced, wittingly or unwittingly, by the

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[19] The dissenters in *Aguilar* notably did not take issue with the Court's characterization of the religious schools in New York as "pervasively sectarian," 473 U.S. at 412. Rather, the dissenters emphasized that there was no demonstrated reason to conclude that "a dedicated public school teacher will tend to disobey instructions and commence proselytizing students at public expense merely because the classroom is within a parochial school." *Id.* at 427 (O'Connor, J., dissenting).

surroundings of a religious school, and that close supervision of the religious school would be necessary to ensure that this did not occur. But as we have explained, there is no basis in the record for the counterfactual hypothesis that public school teachers would lapse into subtle religious indoctrination. Further, any oversight of teachers to ensure that their instruction remains secular would not require interference with the religious mission of the schools, since a public school authority need only supervise its own employees—not the parochial schools—to make sure that the state keeps clear of church affairs.[20]

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[20] If the Court should conclude that further evidence or findings would be appropriate regarding the circumstances of the Title I program as it is or would be administered in New York, the Court could vacate the judgment of the court of appeals and remand the case with instructions to the district court for further proceedings on petitioners' Rule 60(b) motion under the principles announced in the Court's decision.

CONCLUSION

The Court's decision in *Aguilar* v. *Felton*, 473 U.S. 402 (1985), should be overruled. Accordingly, the judgment of the court of appeals should be vacated, and the case should be remanded with instructions to vacate the injunction.

Respectfully submitted.

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FEBRUARY 1997

APPENDIX

TITLE I, PART A
POLICY GUIDANCE

IMPROVING BASIC PROGRAMS OPERATED BY LOCAL EDUCATIONAL AGENCIES

[SEAL OMITTED]

U.S. DEPARTMENT OF EDUCATION
Office of Elementary and Secondary Education
Compensatory Education Programs

April 1996

* * * * *

PROVIDING SERVICES TO ELIGIBLE PRIVATE SCHOOL CHILDREN

* * * * *

[p. 13]

Q5. If a school in the attendance area in which eligible private school students reside is operating a schoolwide program, are private school students to be offered a schoolwide program?

A. No. Because private schools are not eligible for Title I services, schoolwide programs may not be operated in private schools. However, eligible private school children residing in an area served by a schoolwide program school must be offered equitable services.

Q6. May an LEA provide services to private school children that are not equitable to those provided to public school children, if, after receiving an offer of equitable services, the private school officials or parents choose to have the children participate in only some of the services?

A. The statute requires that an LEA offer equitable services to private school children; it does not require that private school children accept or participate in all those services. If private school officials or parents choose to have their children participate in only some of those services, and decline participation in others, the LEA will have met its responsibility by providing those services in which private school children wish to participate. LEAs should continue to offer equitable services in future years, however, rather than offering only those services in which children participated in the past.

Q7. When a child residing in a Title I attendance area in one LEA attends a private school in another LEA, which LEA, if any, is responsible for service the child?

A. The LEA in which the child resides is responsible to provide services for the child. The LEA may, however, arrange to have services provided by another LEA, reimbursing that LEA for costs.

Q8. May an LEA establish a minimum number of private school children selected for the program in order to establish a Title I program near the private school? If so, what is the LEA's responsibility to serve children attending private schools with fewer than that minimum number?

A. Section 1120(a) of Title I requires that LEAs provide for the participation, on any equitable basis, of eligible children enrolled in private schools. The requirement applies regardless of the number of children attending a private school. However, when the number of eligible children at one location is very small, the cost of establishing certain types of programs to serve them may be prohibitive, especially when these children may be from several grades or have different educational needs. In this case, other options should be considered. For instance, if it is feasible and equitable, LEAs may adopt methods, such as take-home computer programs, individual tutoring programs, or professional development activities.

* * * * *